

Lee Ah Chor v Southern Bank Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL
NO 02-62-90
ABDUL HAMID OMAR LP, GUNN CHIT TUAN AND JEMURI
SERJAN SCJJ
10 DECEMBER 1990

Banking — Guarantee — Notice of demand — Notice given by solicitor and not by officer of bank — Whether there was proper demand

Banking — Guarantee — Failure to specify rate of interest in the guarantee — Whether guarantee void for uncertainty

Banking — Guarantee — Two guarantees executed — Appellant guarantor under first guarantee — Whether second guarantee a substitution for first guarantee — Whether appellant thereby discharged from liability under first guarantee

Civil Procedure — Pleadings, importance of — Issues raised during appeal not pleaded at trial — No evidence adduced at trial — Issues should not be allowed to be argued and succeed on appeal

In this case the respondent had granted an overdraft facility to a company and this was guaranteed jointly and severally by the directors of the company, including the appellant. The guarantee which was executed on 6 January 1982 was a continuing guarantee up to the limit of \$700,000. Subsequently, another guarantee dated 19 September 1983 was executed by four directors of the company, excluding the appellant and two other directors. On 13 January 1984, the respondent's then solicitor demanded payment of a sum of \$506,242.35 being the sum in excess of the overdraft from the company. As no payment was made the respondent commenced proceedings against all the guarantors. Judgment was given against them and the appellant appealed.

Held, dismissing the appeal:

(1) Where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

(2) It was clearly provided by the first guarantee that the service of the notice can either be made by an officer of a bank or by the solicitor as agent of the bank and therefore the service of the notice by the solicitor acting for the respondent was a valid service of the notice in this case.

(3) The guarantee must be considered together with the letter of offer from the bank and as the interest was fixed in the letter of offer at 16% per annum and this was accepted by the appellant without protest or objections when the statement of accounts was sent from time to time, the guarantee was valid despite the omission of the rate of interest in the guarantee.

(4) On the proper construction of cl 5(iii) of the first guarantee, the liability of the appellant under the first guarantee for the sum of \$700,000, which comes within the scope of the words 'any money hereby guaranteed', is clearly preserved.

(5) On the appellant's argument that the second guarantee should be taken to be in substitution for the first, the court was of the view that since the guarantors for the first guarantee cannot be said to be 'identical' to the guarantors for the second guarantee, it cannot be decided by implication that there was a substitution as argued. The amount guaranteed and the terms of repayment were also different. There was also no evidence that it was intended by the appellant that the first

guarantee be replaced by the second. Instead, the evidence shows that the respondent intended the two guarantees to subsist side by side.

[Bahasa Malaysia summary]

Di dalam kes ini responden telah memberi kemudahan overdraf kepada sebuah syarikat dan ini telah dijamin bersama dan berasingan oleh pengarah syarikat itu termasuk perayu. Jaminan itu yang telah dibuat pada 6 Januari 1982 adalah jaminan berterusan hingga batas \$700,000. Kemudiannya suatu lagi jaminan bertarikh 19 September 1983 telah dibuat oleh empat pengarah syarikat itu, tidak termasuk perayu dan dua orang pengarah lain. Pada 13 Januari 1984 peguamcara responden pada masa itu telah meminta pembayaran jumlah \$506,242.35 iaitu jumlah yang melebihi overdraf itu dari syarikat itu. Oleh kerana tidak ada apa-apa pembayaran dibuat, responden telah mengambil tindakan terhadap semua penjamin itu. Penghakiman telah diberi terhadap mereka dan perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Apabila sesuatu isu yang mustahak tidak ditimbulkan di dalam pliding ia tidak boleh dihujahkan dan dibenarkan berjaya di dalam rayuan.

(2) Telah diperuntukkan dengan jelas di dalam jaminan pertama itu bahawa penyerahan notis boleh dibuat sama ada oleh pegawai bank itu atau oleh peguamcara sebagai wakil bank itu dan oleh kerana itu penyerahan notis oleh peguamcara yang bertindak bagi pihak bank adalah penyerahan yang sempurna di dalam kes ini.

(3) Jaminan itu hendaklah dipertimbangkan bersama dengan surat tawaran yang dibuat oleh bank itu dan oleh kerana bunga telah ditetapkan di dalam surat tawaran itu pada kadar 16% setahun dan ini telah diterima oleh perayu tanpa bantahan atau tentangan apabila penyata akaun dikirimkan dari masa kesemasa, jaminan itu adalah sah sungguhpun kadar bunga itu tidak disebut di dalam jaminan itu.

(4) Menurut tafsiran sebenar cl 5(iii) jaminan yang pertama, tanggungan perayu dibawah jaminan yang pertama untuk jumlah \$700,000, yang berada didalam lingkungan perkataan-perkataan 'any money hereby guaranteed', adalah jelas dipelihara.

(5) Berkenaan hujah perayu bahawa jaminan yang kedua harus diambil sebagai pengganti yang pertama, mahkamah berpendapat bahawa memadangkan yang penjamin bagi jaminan yang pertama tidaklah boleh dikatakan sebagai 'sama' dengan penjamin jaminan yang kedua, tidaklah boleh diputuskan secara implikasi bahawa terdapat penggantian seperti yang dihujahkan. Jumlah yang dijamin dan terma pembayaran balik juga berlainan. Juga tidak ada keterangan bahawa perayu menghajatkan jaminan yang pertama diganti dengan yang kedua. Sebaliknya, keterangan menunjukkan bahawa responden menghajatkan kedua-dua jaminan itu hidup bersampingan.]

Cases referred to

- 1 *Central Provident Fund Board v Ho Bock Kee* [1981] 2 MLJ 162 (distd)
- 2 *Mobil Oil Australia Ltd v Costa* (1969) 14 FLR 343 (distd)
- 3 *Mutiah Chettiar v Periyar Kone* AIR 1920 Mad 115 (refd)
- 4 *Oversea-Chinese Banking Corp Ltd v Philip Wee Kee Puan* [1984] 2 MLJ 1 (refd)
- 5 *Orang Kaya Menteri Paduka Wan Ahmad Shukri bin Wan Rashid v Kwong Yik Bank* [1989] 3 MLJ 155 (distd)
- 6 *Chartered Bank v Yong Chan* [1974] 1 MLJ 157 (fold)

- 7 *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 (folld)
- 8 *Farrel v Secretary of State* [1980] 1 All ER 166 (folld)
- 9 *Esso Petroleum Co Ltd v Southport Corp* [1956] AC 218 (folld)
- 10 *Muniandy & Anor v Muhamad Abdul Kader & Ors* [1989] 2 MLJ 416 (refd)
- 11 *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 156 (refd)
- 12 *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 3 MLJ 287 (refd)
- 13 *Canadian Petrofina Ltd v Motormart Ltd* [1970] 7 DLR (3rd) 330 (distd)
- 14 *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84 (refd)
- 15 *Mahoney v McManus* (1981) 55 ALJR 673 (refd)

Appeal from: Civil Suit No 1320A of 1984 (High Court, Ipoh)

Sri Ram for the appellant.

Dato' Lim Seng Choon for the respondent.

Cur Adv Vult

Jemuri Serjan SCJ (delivering the judgment of the court): By a letter dated 6 January 1982, the respondent, Southern Bank Bhd ('the bank') granted an overdraft facility of \$700,000 to Sin Hup Woh Transport and Trading Agencies Company Bhd ('the company'). The overdraft facility was serviced by a charge over eight parcels of properties and guaranteed jointly and severally by the board of directors of the company of whom the appellant was a member. The guarantee, which was executed on 6 January 1982, was a continuing guarantee to the limit of \$700,000. By a letter dated 13 January 1984, the respondent's then solicitor demanded payment of a sum of \$506,242.35 being the sum in excess of the overdraft from the company. As no payment was forthcoming the respondent commenced proceedings by a writ of summons dated 1 September 1984 against all the guarantors. According to the amended statement of claim, the amount claimed by the respondent was for a sum of \$1,311,792.85 together with interest thereon at 16% pa from 17 July 1984 to the date of satisfaction. The liability on the guarantors including the appellant arose out of the guarantee dated 6 January 1982 and another guarantee dated 19 September 1983 which was executed only by four directors of the company, excluding the appellant and two other directors. The second guarantee was also a continuing guarantee and to cover the overdraft as well as two term loans which had been approved but not released. The guarantors' liability under the second guarantee was up to the limit of \$900,000 in respect of credit facilities, made up of apparently the approved term loans of \$200,000 and \$90,000 and the overdraft of \$700,000.

In the appeal before us learned counsel for the appellant submitted that there were only three issues for our determination:

- A (i) whether a proper demand was made on the appellant;
- (ii) whether the appellant was released from his liability under the first guarantee by reasons of the respondent having obtained the second guarantee from the directors; and
- B (iii) whether the failure to specify the rate of interest by leaving it blank in the first guarantee renders the first guarantee void for uncertainty.

On the first issue it was contended for the appellant that the notice was given by Mogan & Co, the then solicitor for the respondent, and not by one of its officers as provided under cl 11 of the first guarantee which prescribed the mode in which the notice or demand was to be made. Since there was non-compliance with the prescribed mode the notice of demand was therefore nugatory. In this connection *Central Provident Fund Board v Ho Bock Kee*¹ and *Mobil Oil Australia Ltd v Costa*² were quoted as authorities. It was further contended that the demand made was for payment of the sum of \$506,242.35 which was in excess of the overdraft limit of \$700,000 for which sum the appellant was only liable under the first guarantee.

With regard to the second issue the contention was that since there was a change in the constitution of the board of directors in 1983, and the resignation of the appellant on 30 March 1983, and the second guarantee was executed only by the newly constituted board of directors but without the appellant, the respondent intended to exclude the appellant as a guarantor. The respondent consequently was estopped from relying on the first guarantee. Furthermore, since no separate overdraft facilities were granted for \$990,000 as claimed in the amended statement of claim, the sum of \$700,000 in the first guarantee therefore merged into the second guarantee. Thus, the appellant was discharged from his liability because of the substitution of the second guarantee for the first guarantee.

The submission by learned counsel for the appellant on the third issue centered on the uncertainty of the rate of interest. Because the rate of interest which was an essential element of the guarantee was omitted from the guarantee, the guarantee was void — *Mutiah Chettiar v Periyar Kone*³ was quoted as authority. Counsel admitted that this issue was not pleaded in the defence but cross-examination on it did take place and no objection was taken. *Oversea-Chinese Banking Corp Ltd v Philip Wee Kee Puan*⁴ was the authority for this proposition.

Before we deal with the contentions of the appellant on these issues, it is pertinent to advert to the defence raised by the appellant in his amended statement of defence, his evidence at the trial and the finding of the trial judge in the court below. Significantly it was ob-

served that based on the evidence and the amended statement of claim, the whole fabric of the defence was ostensibly the total denial by the appellant of his involvement with the affairs of the company, of the knowledge of any overdraft facility provided by the respondent, of any debt to the respondent and the execution by him of both the first and the second guarantee and that the respondent ever required him to execute the guarantee. It would appear as if we were made to believe that he was a nominal director only. However he also averred that, assuming if he executed the first guarantee by taking the second guarantee for the sum of \$900,000 executed on 19 September 1983 the respondent by the conduct of its officers, servants or agents had waived any claim against the appellant in respect of the earlier guarantee allegedly executed by him. Any liability, if any, on his part arising from the earlier guarantee in any case had been discharged by the substitution of the second guarantee.

In his judgment the learned judge held that the blanks in the first guarantee in respect of the rate of interest did not invalidate that guarantee because the rate of interest had been stated in the offer letter and none of the guarantors including the appellant ever raised objections or queried the interest when the monthly statements of accounts were sent to them. However, the learned judge did not deal with the defendant's averments that the substitution of the second guarantee which was signed by only four directors discharged him from his liability in the first guarantee. The learned judge did not, understandably enough, offer any view on this issue, apparently probably because no extrinsic evidence was adduced by the defendant to prove the substitution of the second for the first guarantee nor any specific and convincing submission on it except for the suggestion that no explanation was offered for the second guarantee which included the \$700,000 overdraft and that the first guarantee was defective in some way. How or why it was defective was left to speculation. Instead, it was held by the judge that it was of no consequence that the second guarantee was entered into as the action before him was not in respect of the first guarantee but of the second guarantee. As for the submission that the second guarantee was entered into because of the defects in the first guarantee the learned judge held that the second guarantee was not necessary because no further sums of money was released under the second guarantee.

It was manifestly clear in our view that the learned judge must have indubitably held that the first guarantee was valid and binding on all of the seven guarantors despite the execution of the second guarantee by the new board of directors. Although the amended statement of defence did not plead either proper service of the notice on the appellant or that the notice did not

A comply strictly with the terms of cl 11 of the guarantee the defence counsel nevertheless in his submission raised the issue of the defective nature of the notice on account of the demand for excess overdraft therein and because it was not signed by a bank officer but was signed and sent by the then solicitor for the respondent. Counsel for the appellant also questioned the propriety of the service of the notice on the appellant. Relying upon the evidence before him the learned judge found that the first guarantee was signed by the appellant, the service of the notice was properly made, the demand was made in compliance with the ruling in *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank*⁵ and that the amount due in the notice was correct. Again, probably because this issue was not pleaded, the learned judge made no ruling on the question of the form of the notice.

D It was demonstrably obvious from the record of appeal that the first and the third issues which learned counsel for the appellant canvassed before us were never pleaded at all. A careful scrutiny of the evidence of the appellant himself at the trial shows that evidence was never led and adduced in respect of these two issues. It is all the more perplexing that if these two issues were regarded as vital and decisive for the case of the appellant in the court below they were conspicuously omitted from the pleadings although counsel for the appellant at the trial made some feeble attempts to raise the issues during cross-examination of the first witness for the plaintiff, Saw Siew Thaik, and in his submission at the close of the case for the appellant. No attempts were made to have the amended statement of defence further amended either. The appellant's evidence primarily centered upon the various denials he averred in his amended statement of defence, his denial of the execution of the first guarantee, in particular. It takes Mr Sri Ram, counsel for the appellant, at the hearing of this appeal, to valiantly, in his usual eloquence, canvass these issues which we thought as rather late in the day to pursue though he had to concede boldly that the appellant did in fact execute the first guarantee, thus making a surprisingly right-about turn in the stand taken by the appellant, considering his robust and unrelenting denials during the trial. In his reply to Dato' Lim's submission, Mr Sri Ram said that the issues were argued at the trial. This raises the question whether such vital issues affecting the result of the appellant's case need not be pleaded at the outset but could decisively be determined after cross-examination of witnesses for the plaintiff and submission by counsel for the defendant at the trial.

I Saw Siew Thaik was cross-examined on the demand in excess of the overdraft and on the service but not on the form of the demand and absence of the rate of interest in the first guarantee. Mr AI Raj, counsel for the defendant at the trial, however, in his submission

raised the question of the validity of the service of the notice of demand, the demand itself, because it was in excess of the limit of the defendant's liability under the guarantee, and the mode of service of the notice which was signed and sent by the solicitor for the plaintiff instead of a bank officer as stipulated in the guarantee.

It does not seem necessary for us to emphasize and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our courts. It is only a question of whether counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no heed at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our courts with marked frequency and we do not see how such lapses in the courts should be tolerated at the expense of the clients.

Perhaps it would be sufficient and pertinent to repeat here in the hope that we have said the last words on this issue, what Raja Azlan Shah FJ (as he then was) said in *Chartered Bank v Yong Chan*⁶ at p 159:

In my opinion the pleadings in the statement of claim are not in ideal form. If we are to maintain a high standard in our trial system, it is indubitably not to treat reliance upon forms of pleadings as pedantry or mere formalism.

and what Sharma J said in *Janagi v Ong Boon Kiat*⁷ at p 197:

A judgment should be based upon the issues which arise in the suit and if such a judgment does not dispose of the questions as presented by the parties it renders itself liable not only to grave criticism but also to a miscarriage of justice. It becomes worse and is unsustainable if it goes outside the issues. Such a judgment cannot be said to be in accordance with the law and the rules of procedure. It is the duty of the courts to follow the rules of procedure and practice to ensure that justice is done. These rules are meant to be observed and respected. The faith and the confidence of the public in the law, the Constitution and the government depends to a fairly large extent on the way the machinery of justice functions and it is the duty of those who man that machinery to realize that what they do does not in any way tend to diminish that faith. Everyone is, no doubt, liable to make mistakes but it would have been better if the learned magistrate had acted in less haste and had taken a little time to look up the law on the matter.

The observations of Lord Edmund-Davies in the case of *Farrel v Secretary of State*⁸ at p 173 are equally pertinent:

It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to pay an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments, circumstances

may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable to take steps to deal with it.

Lastly, on the same topic we would adopt the observations of Lord Radcliffe in *Esso Petroleum Co Ltd v Southport Corp*⁹ at p 241 where he said:

It seems to me that it is the purpose of such particulars that they should help to define the issues and to indicate to the party who asks for them how much of the range of his possible evidence will be relevant and how much irrelevant to those issues. Proper use of them shortens the hearing and reduces costs. But if an appellate court is to treat reliance upon them as pedantry or mere formalism, I do not see what part they have to play in our trial system.

We need only to refer to three recent cases where this court had to deal with similar issues to illustrate occurrences of lapses on the part of solicitors in the preparation of their pleadings with the resultant dire consequences. We refer to the recent appeal in this court which had occasion to decide the issue whether to allow a new point raised on appeal but not pleaded and argued in the High Court. In that case the court was unanimous in its decision to refuse to allow the new point to be argued without calling for fresh evidence. Mohamed Azmi SCJ in delivering the judgment of the court in the case of *Muniandy & Anor v Muhammad Abdul Kader & Ors*¹⁰ said at p 418:

Unless the objection raised is merely technical, the importance of pleadings can be found in many authorities. The most instructive is perhaps by Lord Diplock in *Hadmor Productions v Hamilton* [1983] 1 AC 191 (refd) at p 233:

'Under our adversary system of procedure, for a judge to disregard the rule by which counsel are bound, has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice, the right of each to be informed of any point adverse to him that is going to be relied upon by the judge, and to be given the opportunity of stating what his answer to it is ...'

Again on the same page the learned judge continued:

In our view these authorities do not appear to support the appellants' application. The present case does not come under any of the established exceptions. The new point to be raised is not one of jurisdiction or illegality. It is also not a mere omission which could be categorized as falling within the realm of technicality. The so-called 'omission' is in fact a new line of defence altogether. The new defence based on equitable estoppel was never pleaded or argued in the courts below. The stand taken by the appellant throughout was that they were not trespassers because they were paying ground rents to Arumugam Pillai since 1963, and due to the said ground tenancy, they claimed, albeit mistakenly, protection against eviction under the rent control legislation.

In yet another very recent case the same issue fell to be determined by this court. Hashim Yeop A Sani CJ (Malaya) in delivering the judgment of this court quoted *Muniandy's* case¹⁰ and Mohamed Azmi SCJ's observations quoted above. At p 363 of the judgment the learned CJ said:

The crucial issue of the application of the doctrine of severance should have been pleaded and argued before the learned judge and it would be wrong in our view to allow the alternative ground of appeal to be argued at this late stage.

See the case of *Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor.*¹¹ One of the grounds of the dismissal of the appeal by the bank was that the doctrines of severance was not pleaded and argued in the court of first instance. The most recent case where the same subject was discussed is *Associated Pan Malaysia Cement Sdn Bhd v Syarikat Teknikal & Kejuruteraan Sdn Bhd.*¹² Gunn Chit Tuan SCJ at p 296 has this to say:

As regards the tax element it is impossible to assess the reduction to be made for taxation without any or sufficient evidence. Had there been a deduction for tax the amount awarded would of course be less, and following *Daishowa's* case the amount of damages awarded would have been reduced further. However, as pointed out by Mr Murthi, the question of deduction of income tax was not raised at all before the trial judge and there is no evidence adduced by either party as to the liability of the respondent to pay tax or the amount of its tax liability. In the circumstances of this case we would therefore decline to make any further deductions for tax.

All these three cases deal with a similar point, ie that where a vital issue was not raised in the pleadings it could not be allowed to be argued and to succeed on appeal.

In the light of our observations above and on the authorities, we do not propose to lend countenance to Mr Sri Ram's submission on these issues and would dismiss this appeal in respect of these issues.

Even if we have not ruled against the appellant for non-compliance with the rules on pleadings, the grounds of appeal based on the first and third issues would, nevertheless, still fail for the following reasons. The only point raised on the first issue worth considering is whether there was any demand at all within the terms of cl 11 of the first guarantee as the notice of demand was signed and sent by the then solicitor for the respondent and not by one of its officers. Dato' Lim submitted that the demand was properly made since there was evidence that the solicitor was authorized by the respondent to act on its behalf and as such the solicitor acted as agent for the bank. See¹ *Halsbury's Laws of England* (4th Ed) para 702 at p 419. In any event we also noted that cl 11 of the first guarantee admits of flexibility in the mode of making the demand in that it is not a mandatory but a discretionary requirement for the notice of the demand

A to be effectually given by a bank officer. In view of the discretionary nature of the requirement under cl 11 it is therefore proper and valid for the solicitor to act on behalf of the bank by signing and sending the notice of the demand to the appellant. Clause 11 reads as follows:

B Any notice or demand in relation to the matters aforesaid may be effectually given or made to me/us by any officer of the bank or by notice in writing under the hand of any such officer either served personally on me/us or left for or sent by post to me/us at my/our usual or last known place of business in ... (Our emphasis.)

C The authorities cited by the appellant on this point in our view did not avail the appellant because they can be distinguished on the facts. For instance in the case of *Canadian Petrofina Ltd v Motormart Ltd*¹³ neither in the pleadings nor in the evidence was there an indication that any demand was ever made upon the guarantors to honour their undertaking as such. All communications which the guarantors received were sent to them as officials and representatives of the principal debtor Motormart Ltd. Since the giving of the notice or demand had not been given to the guarantors as guarantors it was decided that there was no proper demand and their liability did not arise under the giving of such notice and demand on the guarantors. Similarly in *Mobil Oil Australia Ltd v Costa*,² the option was to be exercised by notice posted by registered mail. It was decided in that case that the notice by ordinary mail was not a compliance with the requirements of the agreement for notice by registered mail and that the notice sent by registered mail, having been made after the commencement of the proceedings, was immaterial to those proceedings. In *Central Provident Fund Board v Ho Bock Kee*¹ one of the questions raised in the Court of Appeal of Singapore was whether the notice sent otherwise in compliance with the agreement was invalid on account of there being no valid notice of default. It was provided in the agreement that notice of default should be sent by registered post and that there was no alternative mode of service provided in the agreement. It was held that since the notice was delivered by hand there was no valid notice. *Orang Kaya Menteri Paduka Wan Ahmad Isa Shukri bin Wan Rashid v Kwong Yik Bank Bhd*⁵ deals with the invalidity of a demand under a guarantee when copies of the demand and not the originals were sent to the guarantors and so is not quite in point.

I In the present case, as clearly provided by cl 11 of the first guarantee, the mode of serving the notice can either be made by an officer of the bank or by the solicitor as agent of the bank and therefore the service of the notice by the solicitor acting for the respondent is a valid notice.

The third issue can also be briefly disposed of. Mr Sri Ram argued that the guarantee was invalid for uncertainty in the rate of interest because of the omission

of the rate of interest in cl 4 of the guarantee. We regret we are unable to accept this contention as on authority it is well established that the guarantee, cl 1 thereof in particular, must be considered together with the letter of offer from the bank dated 6 January 1982. Clause 1 of the guarantee reads:

I/We will pay to you on demand (subject to the limit hereinafter specified) all moneys which now are or may, during the continuance of this agreement, be owing to you from the customer(s) (whether alone or jointly with another or others) or remain unpaid on the general balance of his/their account with you including all advances, overdrafts, and discounts made or allowed by you and all bills, notes, or other instruments held by you, on or in respect of which he/they or either/any of them may be, or have been liable to you, all charges for commission and other ordinary banking expenses, *interest at your usual rate or rates*, for the time being in relation to such accounts with rests as ordinarily calculated by you, although the relationship of banker and customer may have ceased, and all costs, charges, and expenses which you may incur in enforcing, or seeking to obtain payment of all or any part of the money hereby guaranteed, or in respect of which indemnity is given. (Emphasis added.)

The third condition of the approval of the application for the overdraft of \$700,000 to be covered by the first guarantee is in the following terms:

The interest rate/s for the O/D facility shall be at 16% pa at monthly rest (or at any rate/s the bank may at its absolute discretion prescribe from time to time).

In this respect the observations of Lord Denning MR at pp 118-119 in *Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd*¹⁴ are instructive and approximately applicable to the facts of the instant case:

I take a different view from the judge. He has construed the guarantee in its strict literal sense — all by itself — without regard to the letters which accompanied it — and without regard to the surrounding circumstances — or the 'factual matrix' to use the modern equivalent.

The guarantee on 28 September 1970, was of no effect by itself. It only took effect on 31 December 1970, when the sum of \$3,250,000 was advanced. That sum of \$3,250,000 is the connecting link which joins everything together. It was the 'facility' which the bank promised on 23 September 1970, to make available to ANPP and which was to be supported by a mortgage on the Harrison Building; and by a guarantee from the plaintiffs to the bank. It was the 'banking facilities' contained in the guarantee itself. It was the 'facility' which was in fact granted on 31 December 1970, and supported by a mortgage. The words of the printed form must, in my opinion, be subordinated to the express provisions of the correspondence which brought it into being. That correspondence shows, beyond doubt, that the guarantee was intended to cover the US\$3,250,000 lent by the bank to ANPP, even though it was done through the channel of its wholly-owned subsidiary, Portsoken.

We therefore agree with the learned judge's finding that the guarantee was valid and that the interest was fixed at 16% pa which was accepted by the appellant without

A protest or objections when the statements of accounts were sent to them from time to time. The ground of appeal on the third issue would also fail. However, it must be clearly noted that in terms of the first guarantee the appellant's liability is limited to only \$700,000 and we so rule in this appeal.

B On the second issue the crucial question basically is whether the execution of the second guarantee dated 19 September 1983 by the four directors of the company expressly or by implication discharges the appellant from his liability in the first guarantee. Although the issue was pleaded as a defence, no evidence was adduced in the court below to prove that the execution of the second guarantee was intended or had the effect of a substitution for the first guarantee, thereby discharging all the directors of the company as guarantors under the earlier guarantee. It was contended for the appellant before us that because of the change of the constitution of the board of directors of the company which gave the second guarantee without the appellant and the merger of the overdraft of \$700,000 in the first guarantee into the second guarantee there was an indication to exclude the appellant as a guarantor and that the respondent was estopped from relying on the first guarantee. We were in fact invited to infer from this evidence that the second guarantee was in substitution for the first guarantee which also discharges the appellant from his obligation under the first guarantee. No authority was cited for this proposition for according to counsel there is none on this point.

F In the court below evidence was adduced to show that the bank approved to grant the company two term loan facilities, one for the sum of \$200,000 and the other for the sum of \$90,000 with interest at 16% in respect of the first term loan and 15.5% of the other. However, none of the moneys under the term loans was released. Besides, the terms of repayment of the loans were different from the overdraft. Saw Siew Thaik, however, could not explain why it was necessary to execute two separate guarantees, one for the two term loans together with the overdraft of \$700,000 which was already covered by the first guarantee and two, the guarantee for the \$700,000 (ie the first guarantee). This witness was emphatic in her evidence that the suit was instituted based on the first guarantee and the bank was not concerned with the second guarantee under which no moneys had been released yet. She was equally adamant that the bank did not discharge any of the guarantors in the first guarantee when the second guarantee was entered into by the four directors of the company. Dato' Lim for the respondent in his submission drew our attention to cl 5(iii) of the first guarantee which he claimed provided the answer to the question raised in the second issue. Clause 5(iii) of the first guarantee reads:

This guarantee and/or indemnity shall not be prejudiced, diminished or affected nor shall I (we or any/either of us) be released or exonerated by any of the matters following:

- (iii) Any other guarantee, indemnity, security negotiable or otherwise which you may now or at any time hereafter hold from the customer(s) from me/us or any other person in respect of any moneys hereby guaranteed.

We agree with this submission and in our view on the proper construction of cl 5(iii) the liability of the appellant under the first guarantee for the sum of \$700,000 which comes within the scope of the words 'any money hereby guaranteed' is clearly preserved. On this ground alone we would dismiss the appeal on the second issue.

Be that as it may, it would not be out of place to determine this issue in the light of the appellant's contention. The case of *Mahoney v McManus*¹⁵ provides the closest analogy to the present case and we think it is relevant for the determination of this issue. The facts of this case can be briefly summarized:

(1) A guarantee dated 14 August 1973 by which the appellant, the respondent and Mundt jointly and severally guaranteed the due payment to Chrysler Marine Australia Pte Ltd (Chrysler) of all moneys which were then owing or which should thereafter become due and owing to Chrysler by the company pursuant to an authorized dealer sales agreement, made between Chrysler and the company, to which the guarantee was annexed.

In about February 1974 the respondent, who wished to withdraw from the business, resigned as a director and sold his shares to Ambrose Malone. Thereafter, on 15 May 1974, Chrysler and the company entered into a new authorized dealer sales agreement which, by cl 16, provided as follows:

'It is acknowledged by Chrysler and the dealer (the company) that this agreement forms the entire agreement between the parties and that it cancels and supersedes all prior agreements of any nature whatsoever and further that this agreement shall operate as a mutual release by and between the parties in respect of any rights that may have existed under any prior agreement excepting only the obligations of either party to pay to the other any existing indebtedness.'

Annexed to that agreement was a guarantee dated 16 May 1974 executed by the appellant, Mundt and Malone, who agreed that they were jointly and severally liable for the present and future indebtedness of 'the New General Marine Pty Ltd' to Chrysler.

On 31 May 1974 letters were sent by Chrysler to the appellant and to Mundt. With each letter was enclosed an invoice showing that the amount due by the company as at 30 April 1974, 'collectable under personal guarantee' was \$75,167.15. The letters (which were in identical terms) stated that Chrysler's alternatives were either to take legal action which would ultimately lead to the company being placed in liquidation or receivership or to exercise Chrysler's right of recourse under the personal guarantees, and that, since Chrysler did not wish to see the company forced into liquidation, it wished 'to exercise the personal guarantees'. The letters concluded with the following statement:

A 'Unless we are informed by next Monday morning of alternative financing arrangements we will then proceed to exercise our options under the personal guarantees and will therefore pursue by action against each guarantor, the settlement of the full amount outstanding.'

B The letters did not specifically mention the guarantees to which they referred, but the amount claimed was due as at 30 April 1974, before the second guarantee was executed, and was 'existing indebtedness' within the meaning of cl 16 of the agreement to which the second guarantee was annexed. On 11 June a further letter was sent to the appellant (and presumably also to Mundt) on behalf of Chrysler; this letter referred to the guarantee executed on 16 May 1974 and demanded payment of the outstanding balance of \$75,167.15 on or before 20 June, and threatened proceedings under the guarantee if the amount was not paid.

C Gibbs CJ, at p 676 in dealing with the question whether the guarantee dated 16 May 1974 by Mahoney, Mundt and Malone as guarantors should be taken in substitution for and in discharge of the former guarantee dated 14 August 1973, has this to say:

D The guarantee of 16 May 1974 is expressed to be in respect of present as well as of future indebtedness. The parties to it guaranteed payment of the indebtedness which was the subject of the earlier guarantee, and of other indebtedness as well. If all the parties to both guarantees had been the same, it might have been easy to reach the conclusion that they intended, not that there should be two identical guarantees in respect of the same existing indebtedness, but that the latter guarantee was to be taken in substitution for, and to discharge, the former. But the position is different when the parties to the two guarantees are not the same. It is not inconsistent with the continued operation of a joint and several guarantee by A, B and C, that a joint and several guarantee should be taken from A, B and D in respect of the same indebtedness. There is no reason why the two guarantees should not both be effective, so that the creditor can avail himself of either or both, and so that any surety can obtain contribution against all the others. There was no expressed intention to discharge the appellant and Mundt from their joint and several liability under the guarantee of August 1973, and I can see no good reason for implying any such intention; on the contrary, there is every reason to assume that Chrysler would not have intended to discharge the appellant or Mundt, if the effect of so doing would have been to release the respondent from his liability. It is not unreasonable to assume that Chrysler wished to have the benefit of both guarantees. It was not in my opinion established that the guarantee of 16 May 1974 was accepted in substitution for that of 14 August 1973 or that it had the effect of discharging the appellant from his obligations under the earlier guarantee.

H It would seem from the dictum, Gibbs CJ contemplated a situation in which the second guarantee was identical with the first when he said:

I If all the parties to both guarantees had been the same, it would have been easy to reach the conclusion that they intended, not that there should be two identical guarantees in respect of the same existing indebtedness, but that the latter guarantee was to be taken in substitution for, and to discharge, the former.

Such a situation does not obtain in the present case. The guarantors for the first guarantee and the guaran-

tors for the second guarantee cannot be said in the strict sense of the word 'identical' to enable us to decide by implication that the second guarantee is in fact given in substitution for, and to discharge, the former. The amount guaranteed under the first guarantee was also different from that in the second guarantee where the terms of repayment of the term loans themselves are different. Besides, the second guarantee could only take effect if the moneys under the term loans were released but the evidence shows that no moneys had been released thereunder. More importantly, there is no evidence for us to hold that it was intended by the appellant that the first be replaced by the second guarantee and that the guarantor be discharged. On the contrary, we are satisfied on evidence that it was the intention of the respondent that the first and the second guarantee should subsist side by side and not one in substitution for another, with all apparent consequences following. Neither can we imply from the giving of the second guarantee per se such intention. On the other hand we are of the view that the rest of Gibbs CJ's dictum in the passage quoted above is applicable to the facts obtaining in the present case.

In the result on these grounds the appeal should also be dismissed with costs. The deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Raj Selva & Co; Lim Seong Chun & Co.*

Reported by *Prof Ahmad Ibrahim*

A Development & Commercial Bank Bhd v Astrid Jorunn Saniman

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S 7-31-3563-88

LIM BENG CHOON J

24 OCTOBER 1990

B *Civil Procedure — Substituted service — Defendant claiming to be out of jurisdiction — Avoiding service — Order for substituted service on last known address of defendant — Rules of the High Court 1980, O 6 & O 10*

Civil Procedure — Service of summons — Setting aside — Application made before entering conditional appearance — Irregularity — Failure to object — Waiver

C *Evidence — Defendant claiming to be out of jurisdiction — Onus of proof — Evidence Act 1950, s 106*

D The plaintiffs sought an order to sell property in the name of the defendant but charged to the plaintiffs. The plaintiffs twice attempted to serve the originating summons on the defendant, at her last known place of residence but were unsuccessful as the premises was locked. On 21 December 1988 the plaintiffs wrote to the defendant, by AR Registered mail, informing her that the process server would be calling at her address on 30 December 1988 to effect service. The letter was not returned suggesting that it must have been accepted. However the defendant's premises was again locked on 30 December 1988. On 17 January the plaintiffs obtained an order for substituted service on the defendant by way of posting the summons at the defendant's last known address and on the notice board of the High Court at Kuala Lumpur.

E No appearance was entered by the defendant and the plaintiffs obtained a certificate of non-appearance. On 19 June 1989 the defendant was granted leave to enter conditional appearance. However, before entering the appearance the defendant applied, on 19 June 1989, to set aside service of the summons. The defendant claimed that she had lived in Paris for the last five years. She, however, failed to give her personal address.

F *Held*, dismissing the defendant's application:

G (1) The defendant had filed her application before entering a conditional appearance. This was a serious irregularity. However, as the plaintiffs had not objected and had proceeded to take steps to contend the defendant's application, they were deemed to have waived the irregularity.

(2) The onus of proof that the defendant had left Malaysia for France prior to the issue of the OS lies with the defendant.

H (3) Apart from her bare words, the defendant had not produced any concrete evidence to support her claim to be living out of the jurisdiction. It would be an easy matter for her to give the exact date of her departure for Paris from the immigration stampings on her passport. In failing to do so, the court was not prepared to accept her bare statement without scrutinizing it in the light of the totality of the evidence adduced.

I (4) The defendant had affirmed her first affidavit in Kuala Lumpur. She must have received the plaintiffs' solicitors' letter informing her that the process server would be calling to serve the summons on 30 December 1988, and must have known that the plaintiffs would next apply for substituted service.